

1997

Arco Electric v. Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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Shawn D. Turner; Larson, Kirkham & Turner; Attorneys for Plaintiff.

Jan Graham; Attorney General; Gale K. Francis; Assistant Attorney General; Attorneys for Appellee.

Gale K. Francis Assistant Attorney General Jan Graham Attorney General 160 East 300 South, 5th Floor P.O. Box 140874 Salt Lake City, UT 84114

SHAWN D. TURNER (.5813) LARSON1, KIRKHAM & TURNER Attorneys for Plaintiff 4516

South 700 East, #100 Salt Lake City, UT 84107 phone (801)263-2900

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**UTAH COURT OF APPEALS
BRIEF**

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IN THE UTAH COURT OF APPEALS

ARCO ELECTRIC,	:	APPELLANT'S REPLY BRIEF
Petitioner & Appellant	:	Priority No. 14
vs.	:	
UTAH STATE TAX COMMISSION,	:	Case No. 970393 CA
Respondent & Appellee	:	

Gale K. Francis
Assistant Attorney General
Jan Graham
Attorney General
160 East 300 South, 5th Floor
P.O. Box 140874
Salt Lake City, UT 84114

SHAWN D. TURNER (5813)
LARSON, KIRKHAM & TURNER
Attorneys for Plaintiff
4516 South 700 East, #100
Salt Lake City, UT 84107
phone (801)263-2900

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THE CAPTION OF THE CASE CONTAINS ALL OF THE PARTIES

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ARGUMENT

I. THE TAX COMMISSION'S STATED STANDARD OF REVIEW IS IN ERROR.

The Tax Commission argues that this Court should grant considerable deference to the findings of the Tax Commission in this case under the holdings in Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991) and Boyd v. Department of Employment Security, 773 P.2d 398 (Utah App. 1989).

The problem with the Tax Commission's argument is that the issues being appealed in this case have nothing to do with tax law. As set forth in Morton, it is only when the agency is acting within its area of expertise that the courts should grant the deferential standard of review. Morton at 585; see also Boyd at 400.

The issues before this Court are purely issues of statutory interpretation combined with a determination of the reasonableness of dismissing an individual's appeal based upon his failure to attend a status conference of which he received no notice.

Appellant believes the correct standard of review is that set forth within Appellant's Brief.

II. ARCO DID NOT RECEIVE NOTICE AS REQUIRED BY STATUTE OR CONSTITUTION.

The Tax Commission begins the argument in this Brief by stating "When the Commission mailed the notice to the Petitioner's last known address and to the Petitioner's counsel, the Commission fulfilled requirements of proper notification." Respondent's Brief,

The problem with this statement is that it is not true.

From the time the audit was originally performed to the present, the Petitioner's address has never changed. In its Order of Dismissal of Appeal #93-0337 the Tax Commission had no problem in getting the correct address for the Petitioner. Yet this document was filed over a year before the Notice of Status Conference.

If under the Tax Commission's own reasoning, the Order had to be mailed to Petitioner's counsel and to Petitioner's last known address, the Tax Commission has failed to meet that burden, and the Order of Dismissal should be reversed.

A. The "Reasonableness" Of Sending Notice To Arco's Counsel Is Irrelevant.

Under Section IA of the Tax Commission's Brief, they argue that the Commission had been sending correspondence only to Petitioner's counsel since 1993. That simply is not true. That is amply demonstrated by Addendum "D" which is attached to Appellant's Brief. Exhibit "D" also begs the question on why the Tax Commission continued to use the 660 South address for the Petitioner when it knew that that address was not a good one. There is no record that at any time the Tax Commission ever requested a different address from Petitioner's counsel, nor is there any evidence as to why they did not continue to use the address of Dee Clark, whom the Tax Commission knew was the principal for Arco Electric. See Addendum D. To Appellant's Brief.

The test for adequate notice set forth by the U.S. Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) was that notice should comply with the requirements of practicability and must be reasonably calculated to reach interested parties.

Mullane at 318. It is undeniable that the Tax Commission had the information in their possession as to Arco Electric's actual address, and yet were unwilling to use it. Surely under no circumstance would notice be deemed adequate if a party knowing the actual address and location of a party intentionally mailed the information to another address where they knew they were not.

The more fundamental flaw in the Tax Commission's argument however, is that it focuses on the issue of whether it was proper to mail Notice of the Status Conference to Arco's counsel. That is not the question that is being asked. The question that is being asked by this appeal is whether it is proper to dismiss the Petition of a party where no one actually receives notice that the hearing is going to take place. Arco is not arguing that the Tax Commission is obligated to determine whether or not notice has been received. Arco is merely stating that when the evidence is presented that shows that notice was not received that a taxpayer's Petition should not be dismissed.

B. Actual Receipt Is Required Before Dismissal Is a Proper Remedy.

The Tax Commission does not deny that the plain language of Utah Code Annotated, §63-46b-11(1)(b) requires actual receipt of notice prior to the entering of a default against a participant in a formal adjudicated proceeding. Instead, the Tax Commission argues the general proposition of statutory construction that a statute must be interpreted as a whole. While the Tax Commission failed to cite a single Utah citation in support of that proposition, Arco Electric has no problem with that general rule of statutory construction. Arco's problem is in seeing how that rule impacts this case.

The Tax Commission failed to show how the plain language of U.C.A. §63-46b-11 would be interpreted differently if you look at the statute as a whole. The one case cited by the Tax Commission, in terms of this general proposition, was Salt Lake Child and Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017 (Utah 1995), the case does not support the Tax Commission's position. In its brief, the Tax Commission admitted that the holding in that case was "the plain language of the statute prevails unless it makes the statute inoperative". Respondent's Brief, Page 17. Nothing in the plain language of U.C.A. §63-46b-11(1) makes any other provision in the act inoperative. Therefore, the plain language of the statute must govern. Salt Lake Child and Family Therapy Clinic, Inc. at 1020.

The Tax Commission seems to imply there is some sort of conflict between U.C.A. §63-46b-3(2)(b)(i) and U.C.A. §63-46b-11(1), that is just not true. U.C.A. §63-46b-3 sets forth the requirements for commencing an adjudicative proceeding. U.C.A. §63-46b-11 sets forth the requirements for a default. There is no reason why the requirements for beginning a proceeding are the same as those required for defaulting a party already participating in the proceeding.

Instead of disproving the taxpayer's position, this in fact, strengthens it. The legislature uses the terms that it does advisedly and it is important to give effect to the plain meaning of the words within the context of the statute where they are written. Nelson v. Salt Lake County, 905 P.2d 872, 875 (Utah 1995). Accordingly, where there is no evidence of actual receipt the dismissal must be overturned.

The Tax Commission is unable to show how it will be prejudiced in any fashion in this case through a reversal of its Order of Dismissal. The taxpayer however, will suffer serious harm

in that it will be **denied** its constitutional right to have its claims heard in the courts of this state. Weighing this case on the law and in equity, the Tax Commission's order of dismissal **must be** vacated.

III. THE TAX COMMISSION'S DISMISSAL OF ARCO'S PETITION WAS ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONAL.

The Tax Commission does not deny that Arco Electric has a variable constitutional property right which the State is attempting to take through a dismissal of Arco's Petition in this case. Instead, the Tax Commission seeks to bend the argument back to the issue of notice. That argument however, is self defeating as demonstrated in Appellant's Brief and in Paragraph I above. The second portion of Arco's argument, relating to the unconstitutionality of the dismissal of its Appeal relates to the fact that dismissal for failing to attend a scheduling conference is not allowed by statute. In Arco's initial brief, Arco demonstrates that default is only **authorized for failure to attend a hearing**, not for a conference. Arco further demonstrates that under the Tax Commission's own rules, there is a marked distinction between a conference and a hearing.

The Tax Commission's sole response is that this Court should be guided by what the Tax Commission really meant, not what it said. The Tax Commission argues that a conference really should be a hearing, even though their own rules say differently. See Rule 861-1A-1(A)(7) and R861-1A-1(A)(5).

Again, the Tax Commission seeks to have the Court ignore the well established rules of statutory construction and to ignore the plain language of the statutes and rules which govern the Commission's actions. The Tax Commission's argument that when they said this is a status

conference, they really meant that it was to be a formal adjudicative hearing subject to the default provisions is further evidence of the arbitrary and capricious nature of the Tax Commission in this case.

If a taxpayer cannot rely upon the plain language used, but instead must be forced through some crystal ball to try to discern what the Tax Commission really means when it says something else, a taxpayer is left with nothing but confusion and a complete inability to obey the law.

If the legislature, or the Commission itself for that matter, wished to provide for a status hearing, they could have done so. If they wish to provide that a party could be defaulted for failing to attend a status conference they could have done so. They did neither. Accordingly, the decision by the Tax Commission to dismiss Arco's appeal is a violation of Arco's rights, is arbitrary and capricious and should be overturned.

A. The Tax Commission's Argument That Petitioner Has Failed To Marshall Its Evidence Is Disingenuous.

In the final point of its argument, the Tax Commission argues that "Petitioner has failed to Marshall evidence that the Commission misused or exceeded its discretion." Respondent's Brief, Page 22. That simply is not true. It is ironic perhaps, that although the Tax Commission spends a great deal of time claiming that the record does not support the allegations contained in Arco's Brief with respect to the actions of the Tax Commission, the Tax Commission does not deny any of them. It is also ironic that the Tax Commission is claiming that the record in this case is incomplete where it is the Tax Commission that has split Arco's Petition into two separate appeals and where it was the Tax Commission that failed to designate the record of the

other case as part of this appeal. It was for that very reason that Arco garnered some of those documents which are necessary for this appeal and included them in the Addendum to its original Brief.

The Tax Commission's arguments that there is a lack of direct testimony on the point of Petitioner's counsel **not** receiving notice is absurd. Of course there was no testimony, the Tax Commission never provided a hearing. If the Tax Commission itself denies an opportunity to create a record, how can a Petitioner be held accountable for the lack of there being one?

Contrary to the **representations** of the Tax Commission, the record does however, contain statements to the effect that Petitioner's counsel never received notice of the hearing. That evidence is found **at R.11**.

The Tax Commission then goes on to cite a series of cases dealing with Rule 60 of the Utah Rules of Civil Procedure. Those cases are irrelevant. This case is not involving a default judgment or a motion to modify an order under Rule 60. This case has been directly appealed from the decision to dismiss, made by the Tax Commission.¹

As for the assertion that negligence by Petitioner's counsel is no excuse under Rule 60, this argument fails in two aspects. First, we would point out again that this is not a Rule 60 Motion, secondly, there has been no showing of any negligence on the part of Petitioner's counsel. Petitioner's counsel did not receive notice of the hearing. As soon as he received notice that he had failed to attend the hearing, he took what steps were allowed to try to remedy the

¹ The Tax Commission's claim that Arco has failed to show its entitlement to relief is simply not true. The issues in the underlying appeal are shown in Appellant's Brief on pp. 17-20. There has not however been any ruling on those issues and they are not before the Court.

situation. To uphold the circular logic proposed by the Tax Commission would be to allow the Tax Commission to default anybody at any time whom they decided they did not like or did not wish to listen to or whom they felt might cost the State too much money.

They need merely to send a notice to the wrong address or the wrong party or to have claimed to send a notice and failed to do so, and then refuse to hear the matter. They can then turn around and blame it on the Petitioner's attorney and wash their hands of the entire matter.

The perils in such a ruling are obvious.

CONCLUSION

The Tax Commission seeks to ask this Court to ignore the plain language of the statutes and its own rules. Instead it asked the Court to uphold its decision because it has absolute discretion to do anything that it chooses to do. This country does not operate under this autocratic form of government. One of the very reasons we have rules and statutes is to protect the rights of the country's citizenry. If the rules and statutes don't meet the goals of the Tax Commission then they should seek through proper processes to change those rules and legislation. They cannot simply act in contravention and ask this Court to uphold their decision.

Petitioner therefore respectfully requests this Court reverse the Order of Dismissal entered in this matter in order to proceed forthwith.

RESPECTFULLY SUBMITTED this 5th day of September, 1997.

LARSON, KIRKHAM & TURNER



Shawn D. Turner

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of September, 1997 I mailed 2 copies of Appellant's Brief by prepaid first class mail to the following:

Gale K. Francis
Assistant Attorney General
Jan Graham
Attorney General
160 East 300 South, 5th Floor
P.O. Box 140874
Salt Lake City, Utah 84134

A handwritten signature in dark ink, appearing to read "Gale K. Francis", is written over a horizontal line.